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Next 1 Page(s) In Document Denied

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN FOREIGN SERVICE ASSOCIATION, REPRESENTATIVE BARBARA BOXER, REPRESENTATIVE JACK BROOKS, SENATOR CHARLES GRASSLEY, SENATOR WILLIAM PROXMIRE, SENATOR DAVID PRYOR, REPRESENTATIVE PAT SCHROEDER, and REPRESENTATIVE GERRY SIKORSKI,

Appellants,

v.

STEVEN GARFINKEL, Director, Information Security Oversight Office, WILLIAM H. WEBSTER, Director of Central Intelligence, and GEORGE P. SHULTZ, Secretary of State,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

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QUESTIONS PRESENTED*

1. Did the district court err in declaring Section 630 of the Continuing Resolution for Fiscal Year 1988 unconstitutional on its face, under the doctrine of separation of powers, on the theory that Congress has no authority to enact legislation that regulates in any way the President's power to limit the disclosure of national security information?

2. Did the district court err in holding that the congressional plaintiffs do not have standing to seek enforcement of Section 630 where Members of Congress are among the intended beneficiaries of its provisions, which protect the right of Executive Branch employees to disclose national security information to Members of Congress?

*There are no parties to the district court proceeding other than those listed in the caption of this case. In the district court, this case was consolidated with *National Federation of Federal Employees v. United States, Terence C. Golden, Steven Garfinkel, Frank Carlucci, John O. Marsh, Jr., Edward C. Aldridge, Jr., and James H. Webb, Jr.*, No. 87-2284-OG, and with *American Federation of Government Employees, AFL-CIO, Jim Stinchcomb, James Douglas and Louis C. Brase v. Steven Garfinkel, Terence C. Golden, Colin L. Powell, William Webster, Frank Carlucci, Edward C. Aldridge, John O. Marsh, Jr., James H. Webb, Jr. and United States*, No. 87-2412-OG. Those cases contain other claims, which are still pending in the district court, and thus the dismissal of the claims that are common to all three cases did not finally dispose of the other cases.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

TABLE OF CONTENTS

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

TABLE OF AUTHORITIES

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Page

Statutes:

Other Authorities:

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Page

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

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Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION AND ORDER BELOW

The opinion and order of the United States District Court for the District of Columbia, which are not yet officially reported, are reproduced in an appendix to this jurisdictional statement (App. 1a-38a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on May 27, 1988, holding an Act of Congress unconstitutional. App. 37a-38a. A notice of appeal was filed on June 3, 1988, in the

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

United States District Court for the District of Columbia. App. 39a-41a. The district court had jurisdiction under 28 U.S.C. § 1331. Because the district court declared an Act of Congress unconstitutional in a civil action to which three officers of the United States were parties, this Court has jurisdiction under 28 US.C. § 1252, exclusive of appellate review in the court of appeals that is normally available under 28 U.S.C. § 1292. *See Donovan v. Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution provides in pertinent part:

> Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States . . . .
>
> Section 8. The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . .;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies . . .;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Section 9. . . .
No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ..

Article II provides in pertinent part:

Section 1. The executive Power shall be vested in a President of the United States of America.. . .

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, ...

Section 3. . . .he shall take Care that the Laws be faithfully executed . . ..

Section 630 of the Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 100th Cong., 1st Sess. (Dec. 22, 1987), 1988 U.S. Code Cong. & Ad. News (101 Stat.) 1329, provides:

> No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination:
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

> of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;
>
> (5) imposes any obligations or invokes any remedies inconsistent with statutory law:

Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

STATEMENT OF THE CASE

This appeal seeks reversal of a district court ruling that Congress violated the doctrine of separation of powers when it enacted a law that placed certain limits on the President's authority to regulate disclosure of national security information. The facts giving rise to this case are neither extensive nor in dispute, especially in light of the district court's declaration that Section 630 is unconstitutional on its face and in its entirety.

In March 1983, President Reagan expanded the prior policy of requiring federal employees in particularly sensitive positions to sign nondisclosure agreements by ordering that "[a]ll persons with authorized access to classified information . . . [must] sign a nondisclosure agreement as a condition of access." National Security Decision Directive-84 ¶ 1(a). To

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

carry out this requirement, the Administration developed Standard Form 189 ("SF 189"), which federal employees had to sign in order to obtain access to classified information, and Standard Form 4193 ("SF 4193"), which federal employees had to sign in order to have access to that segment of classified information that is related to or derived from intelligence sources and methods and is known as Sensitive Compartmented Information ("SCI").

Both of these forms bind federal employees never to divulge classified or "classifiable" information without prior authorization from the agency that employs them. The Administration contends that this lifelong prohibition extends to congressional disclosures, even where the Member of Congress is otherwise entitled to have access to the information. Employees who have access to classified information must sign secrecy agreements or risk losing their security clearances and, in many cases, their jobs, which require such clearances. Violations of these agreements are punishable by a range of sanctions, including denial or revocation of security clearances and consequential job loss. Of the almost two and a half million federal employees who are cleared for access to classified information, more than 1.7 million had been compelled to sign SF 189 as of October 1987. *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess 62, 67 (Oct. 15, 1987)(Statement of Steven Garfinkel, Director, Information Security Oversight Office). In addition, more than 200,000 federal employees outside the Central Intelligence Agency and the National Security Agency had signed SF 4193 as of September 1986. General Accounting Office, Information and Personnel Security: Data on Employees Affected by Federal Security Programs 3 (Sept. 1986).

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

The forms' restrictions on the dissemination of "classifiable" information and their limitations on disclosures to Congress have been extremely controversial. Many Members of Congress, including the congressional appellants, objected to the use of the term "classifiable" because it both impinges on the free speech rights of federal employees and allows after-the-fact classification of information in order to punish whistleblowers for making disclosures that embarrass their superiors. The Members also protested the applicability of the nondisclosure forms to congressional disclosures because they cut off access to both classified and "classifiable" information that Congress needs to perform its duties, but which executive officials may prefer to keep hidden. In the summer of 1987, several federal employees and their union representatives filed two separate lawsuits challenging the standard forms primarily on constitutional grounds. *National Federation of Federal Employees v. United States*, No. 87-2284-OG (D.D.C. filed August 17, 1987); *American Federation of Government Employees v. Garfinkel*, No. 87-2412-OG (D.D.C. filed September 1, 1987).

Rather than await the outcome of those lawsuits, Congress enacted legislation prohibiting the use of funds during Fiscal Year 1988 to implement the existing forms (or others like them) or to enforce certain of their provisions. Continuing Resolution for Fiscal Year 1988, Public L. No. 100-202, Employee Disclosure Agreements, § 630, 100th Cong., 1st Sess. (1987), 1988 U.S. Code Cong. & Ad. News (101 Stat.) 1329. Section 630, which became law on December 22, 1987, principally limits two aspects of the Administration's nondisclosure agreements. The first two subsections of Section 630 forbid the use of the term "classifiable" and restrict nondisclosure agreements to information that is specifically marked as classified or that the employee knows is either classified or

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

in the process of a classification determination. The next two subsections provide that nondisclosure agreements may not, by a requirement of prior written authorization or otherwise, obstruct the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of Congress or the right of Congress to obtain Executive Branch information under such rules and procedures. The final subsection forbids nondisclosure agreements from imposing obligations or remedies that are inconsistent with statutory law, such as whistleblower protections, and overlaps to a considerable degree with Section 630's other provisions.

Section 630 prohibits the Executive Branch from spending any funds during Fiscal Year 1988 to implement or execute SF 189 and SF 4193, as well any other nondisclosure agreements that contain the offending provisions. However, Section 630 expressly allows enforcement of those aspects of nondisclosure agreements that do not fall within its specific prohibitions.

After the President signed the Continuing Resolution, appellee Steven Garfinkel, the Director of the Information Security Oversight Office ("ISOO"), which is responsible for overseeing the implementation and enforcement of SF 189, undertook certain steps that resulted in partial compliance with Section 630. By letter dated December 29, 1987, he directed agencies to cease requiring employees to sign SF 189 agreements until further notice. Subsequently, he directed agencies to take reasonable steps to notify employees that SF 189 agreements signed after December 22, 1987 are voidable at the behest of the employee, but he did not require agencies to void post-December 22 agreements in the absence of a request from the employee, or to notify employees that certain aspects of pre-December 22 agreements are not enforceable during Fiscal Year 1988.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Appellee Webster, who is the Director of Central Intelligence and is responsible for the protection of SCI, did far less to comply with Section 630. He instructed agencies to continue using SF 4193 and other forms that contain the provisions banned by Section 630, but to attach an addendum that consists of the following sentence:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

The addendum does not identify the section setting forth the restrictions, despite the fact that Section 630 occupies less than one page of a 450-page bill that has no index to assist in locating a section on a particular subject matter. Pub. L. No. 100-202, 1988 U.S. Code Cong. & Ad. News (101 Stat.) 1329. Nor did defendant Webster direct agencies to notify employees of the terms of Section 630 or its effect on previously executed forms containing the now-prohibited provisions.

On February 18, 1988, appellant American Foreign Service Association ("AFSA"), a professional and labor association of foreign service employees whose members have been required to sign SF 4193 both before and after December 22, 1987, and seven Members of Congress, who depend on access to information furnished by federal employees in order to carry out their duties (the "congressional appellants"), filed this lawsuit to compel appellees Garfinkel, Webster, and Secretary of State George P. Shultz to comply with Section 630. Along with the complaint, appellants filed a motion for a preliminary injunction asking the Court to enjoin appellees from requiring federal employees to sign the prohibited nondisclosure agreements during the remainder of this Fiscal Year.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

They also asked the Court to require appellees to treat all agreements signed on or after December 22, 1987 as void and to order appellees to notify the employees who signed such agreements that they are void and unenforceable. Subsequently, appellees filed a motion for summary judgment asking the Court to require that all federal employees who signed the standard forms before December 22, 1987 also be notified of the limitations that Section 630 imposes on the enforcement of such forms. After the plaintiffs in the earlier challenges to the constitutionality of the standard forms amended their complaints to add a challenge based on Section 630, and joined in appellants' motions for a preliminary injunction and for summary judgment, the district court ordered that the cases be consolidated.

In their oppositions to these motions, appellees objected to the standing of all the plaintiffs and pointed to the steps that they had taken to comply with Section 630. Recognizing, however, that their actions likely fell short of full compliance, appellees challenged the constitutionality of Section 630 under the doctrine of separation of powers. To support their claims, appellees submitted an affidavit from appellee Webster asserting that disclosures of SCI may harm national security, and that nondisclosure agreements generally help prevent such disclosures. However, neither that affidavit nor any other evidence in the record even asserts that any of the provisions that are banned by Section 630 is necessary to prevent the disclosure of SCI or that their deletion will render nondisclosure agreements ineffective.[1]

[1]While the case was pending in the district court, appellee Webster approved Standard Form 4355 ("SF 4355") to replace SF 4193. Although SF 4355 does not contain the term "classifiable," and thus complies with one of Section 630's requirements, it contains other provisions that are banned by Section 630.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

In a memorandum opinion issued on May 27, 1988, Senior District Judge Oliver Gasch found that appellant AFSA and the unions and individual plaintiffs in the other actions have standing to seek compliance with Section 630, but that the congressional appellants do not. On the merits, the court held that Section 630 is unconstitutional under separation of powers principles. In its constitutional ruling, which occupies less than six typed pages, the court indicated that it would likely find that appellees had violated Section 630. App. 22a-23a & n.16; *id.* 22a-27a. It also recognized that judicial consideration of Congress' role in regulating national security information has been rare, *id.* 25a, and that "[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information." *Id.* Nonetheless, it concluded that Congress' historical role has been limited to "facilitat[ing] secrecy with appropriate criminal and civil sanctions," and seeking information by subpoena or cooperation, and that "Section 630 departs from history and threatens the balance struck by time and constitutional implication between the pervasive importance of strict protection of national security information and Congress' institutional need for that information." *Id.* 26a. Then, without citing a single case in which a comparable statute had been found to be beyond Congress' powers, the court declared Section 630 unconstitutional on its face and dismissed the complaint on the ground that Section 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." *Id.* 27a.[2]

[2]The fact that Section 630 is scheduled to expire on September 30, 1988 does not render this appeal moot for several reasons. First, Section 630 may be continued as part of a Continuing Resolution for Fiscal Year 1989. Congress may specifically continue Section 630, or it may, as it has often done in recent years, incorporate the restrictions from the prior year in interim continuing resolutions. Thus, this case cannot conceivably be moot

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

REASONS FOR GRANTING PLENARY REVIEW.[3]

In declaring Section 630 unconstitutional on its face, the district court issued a sweeping decision that parts company with accepted separation of powers analysis and places a cloud over virtually all other legislative enactments pertaining to the dissemination of national security information. The district court's ruling strikes down all provisions of Section 630 in every conceivable manifestation. It does this in extremely broad language that essentially precludes Congress from placing any restrictions on the Executive Branch's power to limit the disclosure of national security information, even if such information has not been classified under the President's own classification rules. Moreover, the district court reached this quite startling result without any evidence that the actual operation of Section 630, in fact, impairs the President's ability to protect national security information. A review of Section 630's prohibitions demonstrates that the district court's ruling is completely unsupported and that review by this Court is essential.

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until September 30, 1988, or more realistically, until the appropriations process for Fiscal Year 1989 has run its course. Second, Congress is considering permanent legislation to deal with this issue in a manner similar to that set forth in Section 630, which would take effect at the end of this Fiscal Year. Finally, and most importantly, even if Section 630 expires without other legislation taking its place, the employees who signed offending nondisclosure agreements after December 22, 1987 still have a live claim that such agreements are illegal and void.

[3]The following discussion pertains to appellants' first question presented on the separation of powers ruling below. Appellants believe that the Court can decide the separation of powers issue without deciding the other question presented, which pertains to congressional standing. Although appellants do not seek plenary review of the congressional standing ruling on its own, they have included it in this appeal in the event that the Court concludes that it must decide whether the congressional appellants have standing in order to reach the merits of the separation of powers question.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

A major feature of Section 630, which the district court completely neglected to mention in its separation of powers discussion, prohibits the use of the term "classifiable" and allows nondisclosure agreements to cover only information that is marked classified, that the employee knows is classified, or that the employee knows is in the process of a classification determination. These restrictions ensure that employees will not be punished unless they disclose information that they know may not be disclosed, and that agencies may not classify information after-the fact in order to punish whistleblowers who reveal embarrassing information.

Not only is there no evidence that any harm will flow from this limitation, but appellee Webster's deletion of the term "classifiable" from the most recent SCI agreement demonstrates that national security interests do not compel the use of that term. Similarly, the National Security Council, which deals with some of the nation's most sensitive information, modified SF 4193 by deleting the term "classifiable" and incorporating verbatim Section 630's other restrictions on the information that may be covered by a nondisclosure agreement. And appellee Garfinkel directed agencies to stop using forms that violate this and other aspects of Section 630, without any suggestion of any harm to national security.

Moreover, because the President's own Executive Order governing classification extends only to classified information, it is hard to imagine how excluding "classifiable" information from the scope of nondisclosure agreements intrudes on presidential authority over national security information. Executive Order 12,356, 3 C.F.R. 166 (1982). Indeed, subsection 1 of Section 630 allows nondisclosure agreements to go beyond the Executive Order to cover (1) information that is not classified, if the employee knows that the information is in the process of being classified, and (2) information that is not

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

marked as classified, as required by Executive Order 12,356, § 1.5, if the employee knows that it is classified. Thus, Congress has given the Executive Branch more leeway than that afforded by the President's own classification system.

The second major goal of Section 630 is to protect Congress' access to Executive Branch information, both classified and "classifiable." Congress concluded that the requirement contained in SF 189 and SF 4193 — that employees must obtain prior authorization from their superiors before making disclosures to relevant Members of Congress — threatens to cut off an important source of information for Congress. Accordingly, Congress prohibited nondisclosure agreements from interfering with an employee's right to communicate with Members of Congress in a secure manner as provided by the rules and procedures of Congress.

Neither appellees nor the district court cited any deficiencies in Congress' procedures for maintaining the security of classified information as a basis for finding Section 630 unconstitutional. Instead, as it did for the other aspects of Section 630, the district court simply declared that the congressional disclosure protections were unconstitutional on their face, without any finding of harm to national security or any actual impairment of presidential authority.

In some respects, the district court's declaration of unconstitutionality is most troubling as it applies to the final requirement of Section 630. Subsection 5 prohibits nondisclosure agreements from imposing any obligations or invoking any remedies that are "inconsistent with statutory law." Contrary to the district court's view, this requirement does not, by itself or in combination with the other provisions of Section 630, "permit the President to ensure the secrecy of national security information only by those means authorized by Congress."

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

App. 27a. Rather, it merely precludes the President from acting in direct contravention of statutes that Congress has duly enacted, generally with the assent of the President.

The district court found this requirement to be overly intrusive without reference to any statutes that are implicated by this provision or any discussion of how such statutes might impair the President's constitutional responsibilities. While there might conceivably be some such statutory right or limitation that intrudes on presidential authority over national security information, neither appellees nor the district court identified any such measure. The core statutory provisions covered by this requirement of Section 630, and which, by implication, are also unconstitutional under the district court's ruling, are the whistleblower protection provisions of the Civil Service Reform Act, 5 U.S.C. § 2302(b)(8). *See* 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (floor statement of Representative Jack Brooks, a sponsor of Section 630). Those provisions make it illegal to retaliate against federal employees for disclosing information about government waste and wrongdoing, as long as the employee does not publicly disclose classified information, and they protect employees who disclose such information to Congress, even where the information is classified. Not only did the district court fail to mention these whistleblower protections, but, under its ruling, these provisions, like Section 630, would violate the doctrine of separation of powers.

Aside from lacking support on its own terms, the decision below also conflicts with decisions of this Court, particularly *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The Court there rejected a similar claim that the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note, violated separation of powers principles on its face, because it regulated the disposition of presiden-

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

tial records. In rejecting this claim, the Court set forth the applicable test:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443 (citations omitted).

The lower court did not even purport to apply this test. If it had, it would have been compelled to conclude that Section 630 does not, either on its face or in the vast majority of its applications, prevent the President from carrying out his constitutionally assigned functions since appellees made no showing of any such impairment or of any need for the provisions that are prohibited by Section 630. Indeed, by complying with some of its provisions, appellees have demonstrated quite the opposite.

Instead of identifying some impairment of the President's ability to protect national security information, the district court relied on a broad assertion of presidential authority over national security information, and it completely ignored Congress' constitutional role in national security and appropriations matters. As this Court has observed, authority over national security matters is "confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). And as the D.C. Circuit has explained:

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

> While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of Ambassadors.

United States v. American Telephone & Telegraph Co., 567 F.2d 121, 128 (D.C. Cir. 1977). Moreover, Congress has an additional check on executive actions in national security affairs, as in all others, through the power of the purse. U.S. Const., Art. I, § 9.

The district court also sidestepped the cases in which this Court has struck down executive actions that were founded on claims of national security, because they contravened statutes passed by Congress. As Justice Jackson observed when the Korean War was offered as the rationale for the President's seizure of the steel mills, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . .." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Likewise, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the owners of a ship seized during an undeclared war with France sought damages from the Navy official who seized the ship because his actions were in violation of the statute governing such seizures. The Court ruled that the owners could collect damages, even though the official's actions were consistent with the orders of the Secretary of the Navy, because the Executive Branch cannot give orders that contravene a statute, even in the context of military operations. The district court did not even try to ex-

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

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plain why Congress may restrict the President's authority to safeguard weapons production in wartime or to establish rules governing military action, as in *Youngstown* and *Little*, but may not place far more discrete limitations on the Executive Branch's peacetime use of nondisclosure agreements.

The other decisions of this Court cited below did not involve a clash between an Act of Congress and actions of the President involving national security affairs. Instead, they involved judicial deference to executive actions in national security matters when the President was acting pursuant to an express or implied congressional authorization. Thus, this Term, in *Department of the Navy v. Egan*, ____ U.S. ____, 108 S. Ct. 818 (1988), the Court stated: "***unless Congress specifically has provided otherwise***, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 825 (emphasis added). Similarly, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court upheld a congressional delegation to allow the President to forbid certain arms sales. In contrast to the President's attack on Section 630, the President in *Curtiss-Wright* relied on a statute for his authority and partially defended Congress' delegation of such authority on the basis of his own powers in foreign affairs. Thus, contrary to the district court's view, the decisions of this Court do not stand for the proposition that the Executive Branch has unlimited authority over national security matters in the absence of congressional authorization, and certainly not in the face of a congressional prohibition. *See also Webster v. Doe*, 56 U.S.L.W. 4568 (U.S. June 15, 1988), for a further holding in which the Court rejected the total supremacy of the Executive Branch over all matters relating to national security.

The district court's primary rationale appears to be its conclusion that Section 630 departs from Congress' traditional

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

role in the regulation of national security information. According to the district court, Congress has, in the past, done no more than facilitate secrecy by authorizing criminal and civil sanctions, and therefore it lacks the power to do more than that. App. 26a. Aside from the fact that a statute is not unconstitutional simply because Congess has not enacted such legislation in the past, Congress has long played a prominent role in this area that extends well beyond authorizing sanctions. As this Court recognized in *Nixon v. Administrator of General Services*, "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," 433 U.S. at 445, including several statutes, such as the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and the Federal Records Act, 44 U.S.C. §§ 2201-2207, that place limits on executive control over national security information. Congress has also passed statutes that protect its access to Executive Branch information, *see, e.g.*, 5 U.S.C. § 7211 (protecting federal employees' right to furnish information to Congress); 50 U.S.C. §§ 413-415 (requiring Executive Branch to provide intelligence oversight information to certain congressional committees), and it has ensured that other statutes cannot be used to deny such access, *see, e.g.*, 5 U.S.C. § 552(c)(Freedom of Information Act "is not authority to withhold information from Congress"); 50 U.S.C. § 425 (Intelligence Identities Protection Act may not be construed as authority to withhold information from Congress or its committees).

Moreover, in authorizing civil and criminal sanctions, Congress has not simply delegated unconstrained authority to the Executive Branch to punish disclosures of sensitive information. Rather, in defining the activities that may be subject to punishment, Congress has specifically designated activities for which sanctions may *not* be imposed. Thus, in making it a crime

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Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

to disclose certain sensitive information, Congress stated that the statute does not "prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of [Congress]." 18 U.S.C. § 798(c). Similarly, although the whistleblower protection provisions of the Civil Service Reform Act prohibit retaliation against whistleblowers for making public disclosures only if the information is unclassified, they protect congressional disclosures of both classified and unclassified information. 5 U.S.C. § 2302(b). Therefore, even if past practice were the constitutional litmus test, Section 630 falls well within Congress' prior regulation of the circumstances in which disclosures of national security information may be punished.

In sum, this Court's review is necessary both because the district court's ruling is unfounded in law and because it raises questions of grave importance that go to the heart of the respective roles of the two political branches over national security information. By declaring Section 630 facially unconstitutional, the district court not only cast a cloud over Section 630, but also over all statutes regulating the dissemination of national security information. Such a ruling, by a single district judge, is too important to go unreviewed, and 28 U.S.C. §§ 1252 and 1292 leave appellants no choice but to seek review in this Court.

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

Declassified in Part - Sanitized Copy Approved for Release 2013/01/11 : CIA-RDP89T00234R000200300010-2

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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